

The World Health Organization's Emergency Powers: Enhancing Its Legal and Institutional Accountability

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Abstract

This paper evaluates the powers – both legal and non-legal – which the World Health Organization has at its disposal in an emergency. We demonstrate that the Director-General's emergency decision-making powers are of concern for the relationship between the organization and Member States. We further question to whom it owes accountability as an international institution, and how to enhance it. Existing literature shows how the legal responsibility of international organizations for wrongful acts constitutes one type of accountability. Internal and external institutional inquiries into the WHO's decision-making, though not deriving in legal responsibility, also represent distinct models of accountability. Against this backdrop, the article looks at past and ongoing events where the WHO Director-General's emergency decision-making powers gave way to different modes of accountability, both within and beyond the organization. We provide concluding remarks focused on the need for enhanced accountability in the WHO's exercise of emergency decision-making powers.

Keywords

emergency powers – COVID-19 – accountability – responsibility – governance

1 Introduction

The use of emergency powers by this international organization necessitates a consideration of how these powers play out during events such as the COVID-19 pandemic, and which legal and institutional mechanisms of accountability exist during a health emergency. The current article considers the intersection between international law and international relations theory regarding powers of international organizations. While the article focuses on the former, the latter sheds further light on how executive authority may expand during emergencies at the international level.

An initial legal question is which of the WHO's decision-making powers are only available during "emergency periods". In this regard, the Constitution of the WHO¹ and the International Health Regulations (IHR), provide the WHO with a legal mandate in the field of the cross-border spread of disease in both broad and specific terms.² In turn, the IHR provides the definition of, and procedure for, declaring public health emergencies of international concern (PHEICs), setting an express legal basis for the WHO's executive emergency powers. During PHEICs, a series of decision-making powers are bestowed upon the WHO's Director-General, resulting in an expanded authority.³ Additionally, both the Constitution of the WHO and institutional documents envisage emergency decision-making authority in settings other than PHEICs.⁴

The WHO Director-General's emergency decision-making powers are of major concern for the relationship between the organization and its Member States. Although not necessarily leading to the creation of legal obligations, these emergency decision-making powers may nevertheless have a relevant

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- 1 The Constitutional Functions of the Organization which states that WHO will 'establish and maintain administrative and technical services as may be required including epidemiological and statistical services... and to stimulate work to eradicate epidemic, endemic and other diseases, per Article 2(g), Constitution of the World Health Organization (1946) 14 UNTS 185.
 - 2 Article 12 sets out that the DG shall determine whether an event 'constitutes a public health emergency of international concern' see Mark Eccleston-Turner and Clare Wenham, *Declaring a Public Health Emergency of International Concern: Between International Law and Politics* (Bristol University Press 2021).
 - 3 Upon declaring a PHEIC, Article 15 empowers the DG to issue Temporary Recommendations. These are "non-binding advice" which applies on a "time limited, risk specific basis in response to a PHEIC, so as to prevent or reduce the international spread of disease and minimise interference with international traffic." per, Article 1, International Health Regulations (2005) UNTS 2509.
 - 4 Gian Luca Burci and Mark Eccleston-Turner, 'Preparing for the next Pandemic: The International Health Regulations and World Health Organization during COVID-19' (2020) 2 *Yearbook of International Disaster Law*.

impact on states' interests. In fact, the current framing of the IHR is partly based on an unprecedented self-assertion of executive powers by the WHO's Secretariat during the 2002–2003 SARS outbreak.⁵ Though not legally binding, the WHO's travel warnings in that crisis affected political and economic interests of the states concerned.⁶ It should already be apparent at this juncture that taking a strictly legal approach to the notion of WHO 'powers' during an emergency would be insufficient, and the same is true for a consideration of the accountability mechanisms for the exercise of said power. To this end, this paper engages international relations theory, which, through its broad encapsulation of the key concepts of power and accountability may provide further insights on how executive power is exercised through legally non-binding decisions, and how non-legal mechanisms can be used to control these powers.

Lastly, we engage with two ensuing normative questions related to the WHO's emergency decision-making, namely to whom it owes accountability as an international institution, and how to enhance it. Existing literature shows how the legal responsibility of international organizations for wrongful acts constitutes one type of accountability.⁷ Moreover, internal and external institutional inquiries into the WHO's decision-making, though not deriving in legal responsibility, also represent distinct models of accountability.⁸ Against this backdrop, the article looks at past and ongoing events, notably the COVID-19 pandemic, where the WHO Director-General's emergency decision-making powers gave way to different modes of accountability, both within and beyond the organization. The article provides concluding remarks focused on the need for enhanced accountability in the WHO's exercise of emergency decision-making powers.

5 See, 'SARS, China, and the use of discretionary powers at WHO' in Eccleston-Turner & Wenham, *supra* note 2.

6 David P Fidler, 'SARS: Political Pathology of the First Post-Westphalian Pathogen' (2003) 31 *The Journal of Law, Medicine & Ethics* 485; Adam Kamradt-Scott, *Managing Global Health Security: The World Health Organization and Disease Outbreak Control*. (Palgrave Macmillan 2015).

7 Mark Eccleston-Turner and Scarlett McArdle, 'Accountability, International Law, and the World Health Organization: A Need for Reform?' (2017) XI *Global Health Governance* 27; Mark Eccleston-Turner and Scarlett McArdle, 'The Law of Responsibility and the World Health Organization: A Case Study on the West African Ebola Outbreak' in Mark Eccleston-Turner and Iain Brassington (eds), *Infectious diseases in the new millennium: legal and ethical challenges* (Springer 2020).

8 *ibid.*

2 Legally Framing the Emergency Powers of IOs: Expressed vs Implied

The powers of international organizations (IOs) derive, first and foremost, from their constitutive instruments.⁹ For the most part this is sufficient for the operations of IOs; the powers they are endowed with are expressed within the constitutive instrument(s), any clarification of the scope or expansion of these powers can be sort from Member States via an the IOs Assembly, and this serves as a key accountability mechanism too. Member states can expand, or contract the powers of the IO, or hold it accountable for its exercise of powers. However, when facing crises, IOs require adaptability for rapid response. Thus, several treaties founding international organizations explicitly foresee the potential to act expeditiously in the context of emergencies; it is an implicit recognition that an extraordinary situation cannot be addressed through ordinary decision-making mechanisms.¹⁰ For the purposes of this contribution, the understanding of ‘powers’ of IOs is divided in a strict legal definition rooted in constitutive instruments, and a non-legal one employed in international relations theory, which tackles powers as institutional manifestations of IOs functions in general.

In their legal dimension, the powers of IOs, either as a whole or through their specific bodies, allows them to make decisions¹¹ that may legally bind their addressees, namely states. The element of legal bindingness is determinant when invoking the responsibility of international organizations for legally wrongful acts, as established under Article 17 of the Draft Articles on the Responsibility of International Organizations (DARIO).¹² Thus, it is the default legal understanding of ‘powers’.

Depending on their formulation in the constitutive instruments, IO powers may be expressed or implied. Expressed powers are those directly foreseen by the wording of provisions, leaving no doubt as to their arrogation.¹³ A central example of expressed powers is the Security Council’s powers under Articles

9 Alexander Orakhelashvili, ‘Responsibility and Immunities’ (2014) 11 *International Organizations Law Review* 114.

10 Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (1st ed, Oxford University Press 2010) 45.

11 The meaning of ‘decisions’ is taken from Henry Schermers and Niels Blokker, *International Institutional Law. Unity Within Diversity*, 6th revised edition (Brill/Nijhoff, Leiden/Boston, 2018) §706-§707.

12 Giorgio Gaja, *Third Report of the Special Rapporteur on Responsibility of International Organisations* (13 May 2005), UN Doc.A/CN.4/553, 12–13.

13 Schermers and Blokker, *supra* note 11, §209-§209A.

41 and 43 of the Charter of the United Nations, which can issue binding resolutions authorizing the lawful use of military force in specific circumstances. Conversely, implied powers are those essential for the fulfilment of an IO's functions, even though they may not be directly foreseen in the text of a legal instrument.¹⁴ These powers allow IOs to react to rapidly changing environments without having to wait for usually slower-moving plenary interstate institutions.¹⁵ Thus, powers – including the ones exercised in emergencies – may develop as a matter of institutional practice instead of actual reform of an IO's constitutive instrument. There may be interpretive disagreements on whether the IO's exercise of a power is actually implied, or actually goes beyond what they are empowered to do, ie, *ultra vires*. Any given position has to contend with a potential backlash by the IO's Member States, who may consider the extended power to be an intrusion on their sovereignty.¹⁶ The debate lingers not only on whether the doctrine of implied powers is valid per se, but also on its reach and scope.¹⁷ Analyses often draw upon the historical wariness towards the concept due to the expansion of powers at the national level, usually those of the executive branch.¹⁸

Specific instances of the exercise of the implied powers doctrine highlight how it can be used in practice. For instance, in 1950 the UN General Assembly established the possibility of undertaking emergency sessions through Resolution 377(V) 'Uniting for Peace',¹⁹ a matter not provided for by the Charter of the United Nations. The scope of these sessions is limited to instances falling within the Security Council's primary competence, ie, the maintenance of international peace and security, when the latter fails to act due to the deadlock of its members. In such a context, the UN General Assembly may summon an emergency session within 24 hours. The ensuing question in the example is whether it entails the arrogation of new 'powers' in the legal sense, since its resolutions are legally non-binding for states. Nevertheless, Resolution 377(V)

14 *Ibid.*, p. 197.

15 Benedict Kingsbury and Lorenza Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 *International Organizations Law Review* 319, pp. 334–338.

16 Magdalena M. Martin Martinez, *National Sovereignty and International Organizations* (Kluwer Law International, The Hague/Boston/London, 1996) p.93.

17 José Alvarez, *International Organizations as Law-Makers* (Oxford University Press, Oxford, 2005) p. 93.

18 John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* pp. 210–211.

faced opposition by members who considered it was not explicitly provided for in the UN Charter and encroached upon the Security Council's competences.²⁰

Alternatively, international relations theories have addressed the issue of IO powers more broadly. Powers include the epistemic capacity to both classify objects, to authoritatively fix meanings applicable to facts, and to establish and diffuse norms, all of which states may then follow in their national decision-making.²¹ All of these powers are exercised through specific acts, be they the publication of rankings,²² the drafting of technical recommendations aimed at all or specific states, or, at times,²³ the adoption of decisions changing a legal situation.²⁴ In terms of the potential to issue decisions in general, this conception looks beyond the fact of whether the exercise of IO powers creates new obligations for member states or not.

The notion of 'emergency' is a core qualifier, denoting a state of affairs where ordinary powers, be they expressed or implied, are insufficient to tackle a set of events.²⁵ Though it lacks a fixed definition with clear thresholds,²⁶ the difference between 'normalcy' and 'emergency' stands at the core of the justification of powers only available during the latter. In the legal-plus conception, the common element in both binding and non-binding emergency powers for states is how certain decisions may only be taken in extraordinary circumstances.²⁷ The remaining question is whether the notion operates on a

19 UN General Assembly, Resolution 377(V), 3 November 1950, UN Doc A/1775.

20 Christina Binder, 'Uniting for Peace Resolution (1950)', in Rüdiger Wolfrum (ed.), *Max Planck Institute for Comparative Public Law and International Law* (Oxford University Press, Oxford, 2017), paras. 13–16.

21 Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 *International Organization* pp. 710–15.

22 Bogdandy, Armin von and Goldmann, Matthias, 'The Exercise of International Public Authority through National Policy Assessment: The OECD's PISA Policy as a Paradigm for a New International Standard Instrument' (2008) 5 *International Organizations Law Review* 268–269. Michael Riegner, 'Towards an International Institutional Law of Information' (2015) 12 *International Organizations Law Review* p. 61.

23 In the context of the WHO, see Kamradt-Scott, *supra* note 6.

24 The UN Security Council represents the clearest example, as some authors argued past Resolutions enshrined obligations for UN Member States and are therefore legislative. Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law*. pp. 177–178.

25 Kim Lane Scheppele, 'Small emergencies' (2006) 40:3 *Georgia Law Review* pp. 835–836.

26 Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press 2016) pp. 57–59.

27 On the distinction between ordinary and extraordinary circumstances, Scott Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2013) 34:3 *Michigan Journal of International Law* pp. 499–500.

factual distinction between 'ordinary' and 'extraordinary' situations, explored more in-depth in securitization theories.²⁸ Therefore, the powers of IOs can be addressed beyond their legal dimension. Instead, the acts of international bodies are addressed to the extent they may exert authority over states or even individuals in different ways.

Kreuder-Sonnen addressed the exercise of emergency powers by different IOs beyond their legal framing, focusing on how they may exercise authority both vertically and horizontally.²⁹ His conception of powers encompasses multiple types of acts that are not limited to those where there is a direct addressee, rather encompassing those of a more abstract nature, ie, not aimed at a particular state or individual. The downside of this conception is that it conflates diverse acts in which the relationship between IO powers and its addressees may be very different, at times diffuse. A somewhat distinct formulation of powers, stemming from legal scholarship, is that of Heath, who distinguishes between claims to knowledge-driven authority (particularly by the WHO) and actual decision-making.³⁰ However, Heath does not provide a more concise and delineated understanding of how the exercise of powers leads to specific acts, choosing to frame them instead as the result of delegated authority and the need to uphold certain public law principles and norms.³¹

In the following analysis, we retake elements from these preceding conceptions of IO powers, though we focus on those that have legal instruments as their basis and to the extent they are exercised vis-à-vis Member States, at times steering or even constraining the latter's own decision-making.³²

3 Emergency Powers of the WHO

3.1 *The Constitution of the WHO*

Any discussion of the emergency powers of the WHO is, by necessity, framed around the 2003 SARS outbreak. SARS, which fell outside of the legal remit

28 Barry Buzan, Ole Waever and Jaap Wilde, *Security: A New Framework for Analysis* (Lynne Rienner 1998) p. 33.

29 Christian Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (New product, Oxford University Press 2019). pp.32–40.

30 J. Benton Heath, 'Global Emergency Power in the Age of Ebola' (2016) 57:1 *Harvard International Law Journal* pp. 5–6.

31 *Ibid.*, pp. 16–17.

32 Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* p. 132.

of the then 1969 International Health Regulations,³³ and presented the WHO with a significant new series of powers whereby the Organization found itself acting simultaneously as ‘real-time epidemic intelligence coordinator... principal policy advisor and, perhaps most significantly... government assessor and critic.’³⁴ Some of these functions were traditional in nature for the technical agency; collating and analysing data, providing technical guidance to states. Others were new and represented a major shift in its emergency powers such as recommending travel and trade restrictions to minimise the disease’s spread, even when they had no *explicit* legal mandate to do so.³⁵ *Implicitly*, the source of this exercise of emergency powers can be identified in the Constitution of the Organization, which identifies relevant functions of WHO as being “to act as the directing and co-ordinating authority on international health work” and to “to stimulate and advance work to eradicate epidemic, endemic and other diseases”. Though it should be noted that the Functions further state that the WHO is “to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments”; the extent to which governments requested or accepted the significant extension of WHO powers during SARS is contestable.³⁶ Nevertheless, such was the perceived success of this system that the emergency powers exercised by the Secretariat during SARS ended up being codified within the 2005 revisions of the IHR, giving an *explicit* legal basis for any future exercise of similar emergency powers, especially in respect of trade and travel restrictions.

3.2 *The International Health Regulations*

The International Health Regulations (2005) (IHR) are the singular binding legal instrument governing global health security. A key feature of the IHR is the declaration of a Public Health Emergency of International Concern. Article 12 IHR affords the authority to declare a PHEIC to the WHO Director-General, who shall determine whether an event “constitutes a public health emergency of international concern in accordance with the criteria and the procedure set out in these Regulations.”³⁷

33 The Regulations were concerned only with six notifiable diseases (cholera, plague, relapsing fever, smallpox, typhoid and yellow fever), and minimum hygiene measures at entry and exit ports, not the internal spread of disease within the territory of a state party.

34 Kamradt-Scott, *supra* note 6, p. 88.

35 David L Heymann and Guenael Rodier, ‘SARS: A Global Response to an International Threat’ (2004) 10 *The Brown Journal of World Affairs* p. 185; Adam Kamradt-Scott, ‘The WHO Secretariat, Norm Entrepreneurship, and Global Disease Outbreak Control’ (2010) 1 *Journal of International Organizations Studies* p. 72.

36 David P Fidler, ‘Public Health and the Westphalian System of International Politics’ in David P Fidler, *SARS, Governance and the Globalization of Disease* (Palgrave Macmillan UK 2004). Fidler *supra* note 6.

37 Article 12(4), International Health Regulations (2005).

It has been noted that the PHEIC is intended to act as a “clarion call to the international community” to provide political, financial, and technical support to a public health emergency.³⁸ However, a growing perception amongst member states, and within the Secretariat, is that the PHEIC declaration is a ‘punishment’, reflective of a concerned state’s inability to respond to a health emergency within their territory, or their unwillingness to openly share information and data with WHO. During the West African Ebola outbreak leaked internal emails from WHO revealed that senior leadership considered the declaration of a PHEIC ‘a last resort,’ and that it ‘could be seen as a hostile act,’ as well as that ‘a declaration of that nature would only damage relations with the affected countries’ and ‘it may even push the country away... [t]he problem with declaring a PHEIC is that one has to make recommendations and these risk hurting the country without helping public health.’³⁹ This is particularly important given how, under Article 12(3) IHR, the WHO has the institutional power to declare a health emergency in a state’s territory against the express wishes of that state party.

Which leads us to the *expressed* powers afforded to WHO once a PHEIC has been declared; a PHEIC declaration does not give WHO access to any additional funding, but rather expressed legal powers are limited to the issuing of Temporary Recommendations by the WHO Director-General under Article 15 of IHR. These Recommendations, whilst non-binding, provide public health guidance, including the use of trade and travel restrictions.⁴⁰ Ever since the IHR entered into force in 2007, the WHO has used these Recommendations to counsel states *against* employing trade and travel restrictions, rather than to adopt them. Recommendations of this sort have a history of non-compliance by member states, who, despite WHO issuing Recommendations to the contrary, can be quick to close their borders in the hope of preventing or delaying the spread of an infectious disease into their territory. While Article 43(1) IHR allows states to go beyond the WHO’s recommendations, the onus then falls upon implementing states to both notify and justify, while providing a public health rationale, the additional health measures.

Although Temporary Recommendations under the IHR represent powers applicable as long as PHEICs are active, recently during the COVID-19 pandemic the WHO Director-General deployed them to address more structural issues.

38 Lawrence Gostin and others, ‘Ebola in the Democratic Republic of the Congo: Time to Sound a Global Alert?’ (2019) 393 *The Lancet* p. 617.

39 See reporting at Maria Cheng, ‘Emails: UN Health Agency Resisted Declaring Ebola Emergency’ *Associated Press* (Geneva, 20 March 2015) <<https://apnews.com/article/2489c78bff86463589b41f3faaea5ab2>>.

40 Article 15, International Health Regulations (2005).

Thus, in the statement of 19 April 2021, one of the Temporary Recommendations issued to states parties was based on the 'One Health' perspective and called for states to 'strengthen regulation of wet markets and discourage the sale or import of wild animals' posing zoonotic risks.⁴¹ The Recommendation tackles a matter that ranges beyond the emergency caused by COVID-19, rather aimed at more structural issues. It falls in line with strategies of 'deep prevention' advocated elsewhere by Vinuales, Moon, Le Moli and Burci.⁴² The occasion represents an exceptional instance and deviance by states would not necessarily lead to a legal breach on the basis of Article 43 IHR. Nevertheless, considering how these structural issues are not explicitly foreseen by Article 15 IHR, it shows how the exercise of implied emergency powers can go beyond the underlying juncture in which they arise.

4 Emergency Powers and the Need for Accountability

As the above section makes clear in the context of the WHO, the exercise of IO powers can negatively affect states' interests and, at times, even persons' rights and freedoms.⁴³ This reasoning applies both to actions by IOs that create binding obligations, as well as to those that do not. In the former, the nexus is clearer in those rare instances of IO lawmaking where there is a legal change affecting these acts' addressees.⁴⁴ But, in the case of decisions that do not legally bind states, such a nexus is an empirical one since it is contingent upon there being *actual* negative impact. IO actions that do not bind their addressees and do not carry any relevant impact would not be a source of concern for these purposes. A longstanding methodological concern is how to establish a threshold for when the impact of actions by IOs are considered to be legally relevant.⁴⁵

41 WHO, *Statement on the seventh meeting of the International Health Regulations (2005) Emergency Committee regarding the coronavirus disease (COVID-19) pandemic* (19 April 2021) [https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-coronavirus-disease-\(covid-19\)-pandemic](https://www.who.int/news/item/19-04-2021-statement-on-the-seventh-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic).

42 Jorge Vinuales, Suerie Moon, Ginevra Le Moli and Gian Luca Burci, 'A global pandemic treaty should aim for deep prevention' (2021) 397:10287 *The Lancet* pp. 1791–1792.

43 Bogdandy, et al *supra* note 32, p.117; Eccleston-Turner and Scarlett McArdle, *supra* note 7.

44 Alvarez, *supra* note 17, p. 257.

45 Stemming mostly from a sociological perspective of the bindingness of international law. See eg Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25 *Leiden Journal of International Law* pp. 335–368.

A different question, not discussed at length in the doctrine, is whether the legal powers of IOs entails responsibility for not acting in the face of events requiring action. Thus, it has been argued that the WHO's emergency powers to act in specific circumstances carry with them a corresponding *responsibility* to use such powers when necessary or appropriate.⁴⁶ It is important to note that, whilst in international law there is a clear recognition that international organizations ought to be held legally responsible for their improper exercise of emergency powers (albeit with the substantive limitation to the exercise of the doctrine in such a case is the lack of relevant judicial fora), the notion that international organizations are legally responsible for *failure* to exercise emergency powers is far less developed, and equally lacking in judicial fora.⁴⁷

4.1 *Formal Accountability*

To this end, the lack of formal legal processes to use legal mechanisms to hold an international organization responsible for the (mis)use of their emergency powers is visible in how the remit of the International Court of Justice (ICJ) is highly restricted. This is a major contrast to the national level, where there is a constant push in democratic countries in favour of courts' role in constraining executive-led emergency responses through extraordinary powers.⁴⁸ At first glance, the ICJ is seemingly given some remit for action by the Constitution of the WHO, and also specifically within the Convention on Privileges and Immunities, but this is substantially limited when read together with provisions of the Statute of the ICJ. Only states are able to be parties to adversarial proceedings before the Court,⁴⁹ and the Court is only able to provide Advisory Opinions in respect of *interpreting* international law in respect of an international organization, not enforcing it.⁵⁰ Overall, it appears that the ability to establish responsibility judicially is highly limited; the remit of the ICJ is restricted and all attempts to bring cases in national courts have resulted in immunity preventing any action proceeding against the international organization.

Therefore, the lack of an international judicial system has necessarily meant that questions of the exercise of powers (both emergency and ordinary) by an international organization arise in national courts, which naturally leads us to the question of immunities. While there are questions about the existence and nature of institutions' immunity, including discussions about whether they are

46 Eccleston-Turner and McArdle, *supra* note 7.

47 *ibid.*

48 Kingsbury and Cassini, *supra* note 15, p. 337.

49 Article 34, United Nations, Statute of the International Court of Justice (1946).

50 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* [1999] ICJ Reports p. 62 at p. 88.

absolute or limited, most consider the UN⁵¹ to possess an absolute immunity from prosecution in line with Article 105(1) of the UN Charter, together with section two of the Convention on Privileges and Immunities of the United Nations (1946), which states:

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.⁵²

Furthermore, the WHO Constitution states that: [t]he Organisation shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions.⁵³ All attempts to bring cases in national courts have resulted in immunity preventing any action proceeding against the international organization.⁵⁴ The immunity of international organizations has continued to block numerous cases considering the responsibility of the United Nations.⁵⁵ Despite numerous efforts of potential litigants to overcome the functional liability of international organizations and the ‘denial of justice’⁵⁶ associated with the widespread exercise of immunity, these claims are limited and largely unsuccessful.

From a normative perspective, emergency powers should be coupled with mechanisms ensuring their proper exercise. It should be noted here that by ‘proper’ we do not merely mean lawful, as in exercise of a power in line with the strict legal confines of the source of that power in an *ultra vires* sense. Instead, we take a broader conceptualization whereby ‘proper’ can encapsulate ideas

51 The UN General Assembly concluded the Convention on the Privileges and Immunities of the Specialised Agencies that explicitly included the WHO within its remit, see Adopted by the First World Health Assembly on 17 July 1948 (*Off. Rec. Wld Hlth Org.*, 13, 97, 332), section 1(ii)(g).

52 Article 2, United Nations, ‘Convention on Privileges and Immunities of the United Nations’ (1946) 1 UNTS 15.

53 Article 67(a), Constitution of the World Health Organization (1946).

54 See, for example, *Claimant 1 et al and the Mothers of Srebrenica v the State of the Netherlands and the United Nations* Case Number C/09/295247/HA ZA 07-2973, Judgment of The Hague District Court (16 July 2014).

55 See, for example, *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, Supreme Court (6 Sept 2013); *Claimant 1 et al and the Mothers of Srebrenica v the State of the Netherlands and the United Nations* Case Number C/09/295247/ HA ZA 07-2973, Judgment of The Hague District Court (16 July 2014).

56 ECtHR Application no. 26083/94, judgment of February 18, 1999 and Application no.28934/95, Judgment of February 18, 1999.

of proportionality and necessity in exercising (or not, as the case may be) said powers. The clear limitation of formal legal mechanisms to act as a check on the exercise of emergency powers by international organizations highlights how central non-legal accountability mechanisms are within international law. In many ways this mirrors the domestic legal experiences of some states, whereby the exercise of governmental powers in an emergency falls outside of judicial review.⁵⁷ In such circumstances significant emphasis is placed upon the Parliament to act as a check upon the exercise of government emergency powers,⁵⁸ although the governance structures of international organizations render this an unlikely option, particularly in emergencies.

4.2.1 Global Administrative Law

Legal theories have been posited for tackling normative deficits at the international level. Global Administrative Law, with its emphasis on the powers exercised by international organizations, accountability, and the extent to which ideas from domestic administrative law can help us solve accountability problems in global governance.⁵⁹ The prospects of IOs causing harm by misusing their powers should be coupled with processes for ensuring there is a subsequent review of decisions and omissions, even if it does not lead to specific legal consequences.⁶⁰ Concern regarding the exercise of power by international organizations is not a new phenomenon,⁶¹ grounded in domestic ideas of the rule of law and public administration. In the domestic tradition, public law prescribes the manner in which public power is to be exercised, and the control measures to regulate this exercise of power, creating legal avenues for challenge and redress where decision-making by public authorities fails to abide by these standards.⁶² There has been limited application of these principles

57 For example, in a UK context, government decisions concerning national security cannot be judicially reviewed as per *Council of Civil Service unions v Minister for the Civil Service* [1984] UKHL 9. see Patrick Birkinshaw, *National security and the limits of judicial review* (Routledge, 2018).

58 James Pfander, 'Government Accountability in Europe: A Comparative Assessment' (2003) 35 *George Washington International Law Review* p. 611.

59 Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems*, p. 15.

60 *Ibid*, 17.

61 See Rüdiger Wolfrum, 'International Administrative Unions', in 2 *Max Planck Encyclopedia of Public International Law* p. 1041. (first edition, Rudolf Bernhardt, ed.).

62 Christoph Möllers, 'Constitutional Foundations of Global Administration' in Sabino Cassese (ed), *Research handbook on global administrative law* (Edward Elgar Pub 2016). p. 111.

at the international level, despite its clear importance, as Von Bernstorff noted “If formalized procedural constraints for the exercise of public authority are important at the national level they are all the more so at the international level since conflicts over substantive legal standards and disagreement over community values are usually more acute.”⁶³

However, the ever-expanding mandate and powers which are exercised by international organizations necessitates that these powers, regardless of if they are exercised to achieve a legitimate end,⁶⁴ ought to be subject to administrative oversight and control. Yet, the fact that the powers exercised by international organizations, especially in an emergency, tend to be broadly conceived, lack specificity regarding how the powers are divided amongst the separate bodies of the Organization, and generally make little to no reference to the procedural rules for exercising executive powers or making decision in respect of their utilization.

The GAL proponents have recognised how, in certain settings, its principles were ‘unrealistic and potentially counterproductive’, among other reasons because the realities of international politics have posed insurmountable obstacles.⁶⁵ Ultimately, while GAL might appear as an attractive solution to the accountability deficit of international organizations exercise of emergency powers, the limited recognition it has had at the international level, particularly by relevant actors such as IOs and states, means that it lacks practical application to the problem at hand.

4.2.2 Legal Accountability: Responsibility of International Organizations (ARIO)

While this paper is ostensibly concerned with accountability of the WHO, it is difficult for international lawyers to discuss accountability without also mentioning the law of Responsibility; as Hafner stated, “accountability seems to reflect primarily the need to attribute certain activities under international law to such actors as a precondition for imposing on them responsibility under international law.”⁶⁶ Responsibility is one of the longest standing principles of

63 Jochen von Bernstorff, ‘Procedures of Decision-Making and the Role of Law in International Organizations’ (2008) 09 *German Law Journal* 11, p. 1948.

64 As Jan Klabbbers has put it: “a constitutional approach would radically reject the proposition that the end justifies the means”. Jan Klabbbers, ‘*Constitutionalism Lite*’ (2004), 1 *International Organizations Law Review* pp. 31, 48.

65 Kingsbury and Casini, *supra* note 15 p. 334.

66 Gerhard Hafner, ‘Accountability of International Organisations’ (2003) 97 *Proceedings of the Annual Meeting (American Society of International Law)* p. 237.

public international law,⁶⁷ establishing consequences and redress for breaches of international law. Responsibility arises when an *internationally wrongful* act has been committed, which constitutes a *breach* of international law, and which is *attributable* to the international actor concerned.⁶⁸

Responsibility was originally concerned merely with the actions of sovereign states; the law of responsibility was originally (and arguably remains) the law of *state* responsibility.⁶⁹ Despite this, there has long been a recognition of the need to expand the law of responsibility beyond the state, most notably to international organizations.⁷⁰ These calls largely arose in response to the growth of international organizations, both in terms of number and powers, leading to the International Law Commission (ILC) developing the Articles on the Responsibility of International Organizations (ARIO).⁷¹ In spite of the established differences in nature and powers of states and international organizations,⁷² the ARIO largely mirror the ILC's earlier Articles on State Responsibility,⁷³ which are now well established within international law.

67 Hugo Grotius, 'the rights of war and peace' Ch XVII, Richard Tuck (ed), Jean Barbeyrac (trans) (1625) (Liberty Fund, 2005 edn) vol II, 884; and see the Prolegomena, para. 8 (vol. 1, 86), in Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet and Simon Olleson (eds.) *The Law of International Responsibility* (Oxford University Press, Oxford, 2010), at p.5.

68 Articles 1 and 2 Articles on the Responsibility of States for Internationally Wrongful Acts; Articles 3 and 4 Articles on the Responsibility of International Organizations.

69 Articles on the Responsibility of States for Internationally Wrongful Acts, General Assembly Resolution 56/83 of 12 December 2001; Report of the ILC, 53rd Session, *ILC Yearbook 2001*, Vol.II(2), 25.

70 First Report by A.El Erian, Special Rapporteur, 'Relations Between States and inter-Governmental Organisations, Document A/CN.4/161 and Add.1, contained in ILC Yearbook (1963) Vol.II, A/CN.4/SER.A/1963/ADD.1, p.159 at p.184; Report by R.Ago Chairman of the Sub Committee on State Responsibility, 16 January 1963, Document A/CN.4/152, in Yearbook of the International Law Commission 1963, vol.2, p.227 UN Doc/A/CN.4/SER.A/1963/Add.1 at p.234; *Exchange of Letters Constituting an Agreement relating to the Settlement of Claims filed against the United Nations in the Congo by Belgian nationals New York, 20 February 1965*, No.7780 (1965) *Recueil des Traités* p.198; Vanessa L. Kent, 'Peacekeepers as Perpetrators of Abuse. Examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations', (2005) 14 *African Security Review*; The Secretary General, Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organisation Mission in the Dem. Rep.Congo, U.N. Doc. A/59/661 (Jan. 5, 2005).

71 Report of the ILC, 61st Session, 2009, A/64/10, 13–178.

72 Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232.

73 Articles on the Responsibility of States for Internationally Wrongful Acts, General Assembly Resolution 56/83 of 12 December 2001; Report of the ILC, 53rd Session, *ILC Yearbook 2001*, Vol. II (2), 25.

The ARIO can apply to WHO actions during an emergency in highly specific circumstances. First, the WHO must be accepted as a distinct legal actor on the international stage, and second, the action of WHO must constitute an internationally wrongful act, amounting to a breach of international law.⁷⁴ Even where this is possible, this is highly unlikely to result in any sort of legal consequences, as has been noted “there is a substantial number of practical barriers that stand in the way of determining legal responsibility of an international organization, from lack of judicial fora, to the principle of immunity and the difficult question of how to fund claims for reparation.”⁷⁵

The ARIO only provides states and other IOs the possibility to invoke responsibility.⁷⁶ But there are other mechanisms to hold the WHO accountable beyond the issue of invoking international responsibility for wrongful acts.⁷⁷ Indeed, non-legal forms of accountability can have significantly more relevance in internal and external assessments of institutional actions. Under the more ample understanding of accountability, these inquiries do not necessarily lead to specific legal consequences. Instead, actions taken by other international and regional institutions, as well as by states, may lead to a reputational cost by damaging the WHO’s credibility, potentially through votes of no confidence. In turn, as mentioned above, the organization’s guidance depends, to a large extent, on the direct acceptance of its recommendations by addressees.⁷⁸ Reputational damage may severely undermine the fulfilment of its mandate to act as the authority in matters of international health.⁷⁹ Hence, its usefulness as a source of accountability ought not to be underestimated. The following lines draw upon this broader understanding of accountability to show how the WHO’s exercise of emergency powers have been critically reviewed in the past.

As explained in section III.2, the WHO’s emergency powers to issue declarations of Public Health Emergencies of International Concern (PHEICs) follow the second dimension of IO powers, that is, decisions which *prima facie* do not create new obligations for states. Nevertheless, besides the mechanisms leading to legal responsibility, the relevance of reputational costs should not

74 For an in-depth consideration of both of these issues, and more, regarding the law of responsibility and the declaration of a PHEIC see: Eccleston-Turner and McArdle *supra* note 7.

75 *Ibid.*

76 Article 44 ARIO.

77 Kristen E Boon, Frédéric Mégret, ‘New Approaches to the Accountability of International Organizations’ (2019) 16 *International Organizations Law Review* p. 5.

78 Nico Krisch, ‘Authority, Solid and Liquid, in Postnational Governance’ in Roger Cotterrell and Maksymilian Del Mar (eds.) *Authority in Transnational Legal Theory. Theorising across Disciplines* (Edward Elgar: Northampton, 2016) pp. 38-39.

79 In line with Article 2, Constitution of the World Health Organization (1946).

be disregarded.⁸⁰ The WHO relies, to a large extent, upon its credibility qua technical organization for fostering states' adherence with its standards, recommendations and guidelines.⁸¹ Diminished confidence in the organization's capacities to issue technically sound advice is bound to lead to non-observance.

5 Informal Accountability

5.1 *Internal Accountability*

The internal structure of the WHO is highly relevant to the present conversation; the Organization comprises the World Health Assembly, the Executive Board, and the Secretariat. The Assembly is something of a legislative body for the Organization, as it determines policies, adopts regulations, and can adopt conventions with respect to the objectives of the WHO. The Executive Board, while independent of the Assembly, nevertheless exists as an executive organ of the Health Assembly. Membership of the Board is elected by the Assembly, however, the Board does not need to reflect the national membership of the Assembly,⁸² implying that the Board members are "acting in a manner that is institutionally distinct from the Assembly and the Member States."⁸³ Moreover, the Board elects its own Chair, sets its own rules and procedures,⁸⁴ addresses any questions within its competence,⁸⁵ sets the agenda for the Assembly,⁸⁶ and proposes the general programme of work for the Assembly to vote upon.⁸⁷ Notably for the purposes of the present paper the Board has the power to take measures within the functions and financial resources of the Organization to deal with events requiring immediate action – including within an emergency. To this end, the Board can authorise the Director-General to take "the necessary steps to combat epidemics, to participate in the Organization of health relief to victims of a calamity, undertake studies and research the urgency of

80 Kristina Daugirdas, 'Reputation as a Disciplinarian of International Organizations' (2019), 113 *American Journal of International Law* p. 222.

81 Michael Barnett and Martha Finnemore, *Rules for the World. International Organizations in Global Politics* (Cornell University Press 2004), pp. 24–27; Pedro A. Villarreal, 'Pandemic Declarations of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies' (2016) 7 *Göttingen Journal of International Law* 95 pp. 113–114.

82 Article 25, Constitution of the World Health Organization (1946).

83 Eccleston-Turner and McArdle, *supra* note 7. (2017).

84 Article 27, Constitution of the World Health Organization (1946).

85 Article 28(h), Constitution of the World Health Organization (1946).

86 Article 28(f), Constitution of the World Health Organization (1946).

87 Article 28(g), Constitution of the World Health Organization (1946).

which has been drawn to the attention of the Board by any Member or by the Director-General".⁸⁸

The IHR Review Committee is an internal ad hoc body, composed of experts appointed by the WHO Director-General, with the mandate under Article 50 IHR to, inter alia, "provide technical advice to the Director-General on any matter... regarding the functioning of these Regulations". The wording "any matter" allows for the assessment of the WHO Secretariat's response during PHEICs. While the outcome is legally non-binding recommendations, it can nevertheless be considered to be an avenue for increased accountability. As reports are then presented to the World Health Assembly, the Secretariat's actions may be subjected to the scrutiny of Member States. Past IHR Review Committee reports have been critical of the WHO Secretariat's handling of emergencies, particularly in the aforementioned West African Ebola outbreak.⁸⁹ On that occasion, the World Health Assembly accepted the report without taking further action. But adverse reports could lead to increased scrutiny and may even indirectly affect decision-making at the Assembly, for instance regarding future WHO Director-General elections.

The extent to which these intra-WHO accountability mechanisms are successful or not has been given consideration in multiple reports regarding emergency action, including the Report of the Ebola Interim Assessment Panel – itself an external body – which was commissioned by the WHO, noting that:

The declaration of a PHEIC can lead to disagreements with national governments, and the Panel notes that independent and courageous decision-making by the Director-General and the WHO Secretariat is necessary with respect to such a declaration. This was absent in the early months of the Ebola crisis.⁹⁰

The Report also notes that "[d]elivering an effective emergency response in countries requires significantly strengthened administrative and managerial structures. There must be transparency, accountability, and monitoring, especially for financial resources".⁹¹ The report further proposed a new WHO Centre for Health Emergency Preparedness and Response, which included the creation of an independent board to oversee the work of this new Centre.⁹² This

88 Article 28(i), Constitution of the World Health Organization (1946).

89 WHO, *Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response*, A69/21, 13 May 2016.

90 WHO, *Report of the Ebola Interim Assessment Panel* (2015) <https://www.who.int/csr/resources/publications/ebola/report-by-panel.pdf>, 10.

91 *Ibid.* p. 19.

proposal was not acknowledged or pursued to the WHO Secretariat's response to the Report of the Ebola Interim Assessment Panel.⁹³ Instead, in the WHO Secretariat's response report, the Secretariat notes that they intend to 'Improve functioning, transparency, effectiveness and efficiency of the International Health Regulations' in order to 'facilitate rapid, transparent decision-making and action, and a staffing and financing plan'⁹⁴ during major outbreaks and emergencies, with no further details on how this would be achieved. Further internal accountability mechanisms were proposed in the report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola.⁹⁵ This report recommended the creation of an independent Accountability Commission for Disease Outbreak Prevention and Response in order to 'institutionalise accountability',⁹⁶ recommending that the UN Secretary-General should create an Accountability Commission, which would report to the World Health Assembly and the Security Council's Global Health Committee.⁹⁷

5.1.1 Internal Accountability and the COVID-19 Pandemic

In respect of the ongoing COVID-19 pandemic, there have been a number of internal accountability efforts at WHO. Firstly, a report of the Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response was commissioned.⁹⁸ The Independent Panel for Pandemic Preparedness and Response also provided a report on the response to COVID-19.⁹⁹ In the first instance, the Review Committee appears to have substantively engaged with the notion of accountability, even going as far as to having an entire section dedicated to "accountability and compliance" within their report.¹⁰⁰ However, the Review Committee only engaged

92 *Ibid.* p. 16.

93 WHO, *WHO Secretariat Response to the Report of the Ebola Interim Assessment Panel*, (Geneva: WHO, 2015) <http://www.who.int/csr/resources/publications/ebola/who-response-to-ebola-report.pdf?ua=1>.

94 *Ibid.* 5.

95 Suerie Moon et al., 'Will Ebola Change the Game? Ten Essential Reforms Before the Next Pandemic. The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola' (2015) 386 *The Lancet* pp. 2204–2221.

96 *Ibid.* p. 2212.

97 *Ibid.* p. 2212.

98 WHO, *Strengthening preparedness for health emergencies: implementation of the International Health Regulations (2005)* A74/19 Add.1, 5 May 2021.

99 Report of the Independent Panel for Pandemic Preparedness and Response: *COVID-19: Make it the Last Pandemic*, (Geneva, 2021) at: https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf.

with accountability and compliance from the perspective of the Member States compliance with the IHR. It does not at all engage with accountability for WHO's exercise of powers during the emergency, despite there being significant concerns raised regarding how WHO did (or did not) use its powers during this emergency.¹⁰¹ The report of the Independent Panel again recognised that "accountability for pandemic preparedness and response has been lacking across the system", they continue that "National governments are the primary duty-bearers in pandemic response, and the lack of accountability has been accompanied by failures to learn from mistakes and to take up the opportunity to learn between countries"¹⁰² There is again, a lack of recognition of the power of WHO, either formally, legally, or in a broader conception of power, and that such power lacks corresponding accountability mechanisms. The Independent Panel actually argues for greater power to WHO, stating that the organization needs to be "empower[ed]...to take a leading, convening, and coordinating role in operational aspects of an emergency response to a pandemic."¹⁰³ It is not clarified exactly what this means, only that it does not mean "responsibility for procurement and supplies."¹⁰⁴ Whatever this recommendation for expanded power to WHO during an emergency does mean, it is not accompanied by any recommendations in respect of accountability for the exercise of such powers, or indeed, any recognition within the report of the Independent Panel that WHO exercises power in a manner which requires accountability at all.

These reports are reflective of wider issues with the WHO approach to accountability. It has been previously noted that WHO views its role as an encourager, or enforcer of compliance, in a top down manner, rather than a shared engagement process, whereby WHO is also accountable for its exercise of powers during health emergencies.¹⁰⁵ Along these lines, the proposals "would strengthen the external accountability mechanisms of the WHO... ensuring the answerability of actions and, from this, seeking to better improve policy and action in light of these answers."¹⁰⁶ However, "the WHO needs to adopt a much more holistic approach to accountability across the Organization in respect of all of its operations and actions, not merely the ones where accountability has been found to be most lacking, most recently."¹⁰⁷

100 *Ibid*, 3,10.

101 *Ibid*, pp 53–55.

102 *Ibid*, p. 71.

103 *Ibid*, p. 49.

104 *Ibid*, p. 49.

105 Eccleston-Turner & McArdle, *supra* note 7.

106 *Ibid*.

5.2 *External Accountability*

Beyond the WHO's own appointed review bodies, other international institutions have the possibility to hold the organization to a softer form of accountability for its actions. External mechanisms of accountability are conceptually debatable in multiple ways. To begin with, the question of which criteria the WHO should be held accountable would derive from an outsider's perspective. It risks replacing the goals of international health, at the core of the WHO's mandate under its Constitution, with other rationales. And, in the case of for-profit entities, the potential of conflicts of interest is always present.¹⁰⁸ We address these in turn, below.

5.2.1 Other UN Bodies

Although the WHO is embedded in the UN system, it does not respond to any hierarchical superior; it has legal personality¹⁰⁹, and a budget independent from the main UN structure. Even though the ARIO also allow other IOs to invoke the WHO's responsibility for its decisions,¹¹⁰ so far it remains a mere theoretical possibility. Nevertheless, in an Agreement with the UN, the WHO undertook the legal commitment to submit all recommendations of UN bodies to the Health Assembly, the Executive Board, as well as to issue periodic reports including on the follow-up to those recommendations.¹¹¹ The WHO is particularly bound to furnish information and rendering assistance to the Security Council whenever it is so requested.¹¹²

Other UN bodies may, and have, conducted formal inquiries on the WHO's responses to emergencies. Although these external inquiries have never led to follow-up decisions carrying *legal* consequences for the WHO, the resulting reports have nevertheless subjected the organization's work to thorough critical assessments and may act as a political nudge to 'course correct' what is perceived as errant behaviour.¹¹³

¹⁰⁷ *Ibid.*

¹⁰⁸ Anne Peters, 'Managing conflict of interest: lessons from multiple disciplines and settings', in Anne Peters and Lukas Nadschin (eds.), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press: Cambridge, 2012) pp.409–411.

¹⁰⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ GL No 95, [1996] (ICJ 1996), 8th July 1996.

¹¹⁰ Gian Luca Burci and Clemens Feinäugle, 'The ILC's Articles Seen from a WHO Perspective' in Maurizio Ragazzi (ed), *Responsibility of International Organizations* (Brill | Nijhoff 2013).

¹¹¹ Agreement between the United Nations and the World Health Organization, approved by the General Assembly of the United Nations on 15 November 1947, UNTS 115, Articles IV and V.

¹¹² *Ibid.*, Article VII.

For example, an increased scrutiny of the WHO took place during the West African Ebola crisis of 2014–2016, when the UN Secretary-General, and afterwards the Security Council, decided to create the United Nations Mission for Emergency Ebola Response (UNMEER). The move was viewed as a recognition of the WHO's failure to respond promptly and effectively to the crisis.¹¹⁴ Similarly, parallel to the IHR Review Committee instituted for this event, a High-Level Panel was summoned by the United Nations Secretary-General.¹¹⁵ In its final report, the Panel noted the lacking initial response by the WHO Secretariat to the crisis.¹¹⁶ Several operational shortcomings were deemed to be partially the result of the existing legal framework.¹¹⁷ Yet a large part of the blame was placed on the Secretariat for its delayed declaration of a PHEIC.¹¹⁸ The episode showed how other UN bodies may scrutinise the WHO whenever they deem that it does not exercise its emergency powers in accordance with the expectations of the international community of states. While no legal consequences follow, the pressure exerted for a change of direction is a significant one.

5.2.2 Regional Institutions

The WHO does not have any form of hierarchical relationship with regional bodies. Yet, in the past, its use of emergency powers has been subjected to regional scrutiny, as a form of accountability. A notable example is the Council of Europe, where an inquiry into the WHO's handling of the H1N1 pandemic was conducted at the request of the Parliamentary Assembly.¹¹⁹ At stake was the suspicion that the pharmaceutical industry exerted an undue influence upon the organization's internal decision-making.¹²⁰ As a result, WHO officials

113 Besides the ongoing external investigations related to the WHO's handling of the COVID-19 pandemic, deeper inquiries have been conducted externally due to both the H1N1 influenza pandemic of 2009–2010 and the West African Ebola crisis of 2014–2016.

114 Adam Kamradt-Scott, 'WHO's to blame? The World Health Organization and the 2014 Ebola outbreak in West Africa' (2016) 37:3 *Third World Quarterly* p. 404.

115 United Nations, Secretary-General Appoints High-Level Panel on Global Response to Health Crises (2 April 2015) <https://www.un.org/press/en/2015/sga1558.doc.htm>.

116 Report of the High-Level Panel on the Global Response to Health Crises, United Nations General Assembly, A/70/723, 133–139.

117 Eyal Benvenisti, 'The WHO: Destined to Fail? Political Cooperation and the COVID-19 Pandemic' (2020) 114:4 *American Journal of International Law* pp.588–597; Moon et al, *supra* note 95, pp. 2204–2221.

118 Kamradt-Scott, *supra* note 113, p. 404.

were summoned – though not subpoenaed under the threat of sanctions – to provide explanations.¹²¹ During the hearings, critical questions were posed by parliamentarians on the institutional decision-making process that led to the declaration of a PHEIC and a pandemic.

After the Council of Europe inquiry ended, a resolution was issued calling for more transparency in the WHO's decision-making.¹²² But the resolution did not go as far as to express any malfeasance by the organization. So far, it has been a one-off issue: no other inquiry has ever been called concerning a PHEIC declaration. Nevertheless, the Parliamentary Assembly's investigation constitutes an example of regional bodies' external oversight of the WHO in its exercise of emergency powers. Future developments in a similar vein should not be discarded as an option to fill accountability gaps.

5.2.3 Member States

Amongst the diverse specialised agencies of the UN, the WHO has one of the most widespread memberships, currently standing at 194. Through their adherence to the WHO's Constitution and the payment of their mandatory ('assessed') financial contributions, states become voting members in the organization. To this end, decisions affecting an organization's finances can be a major source of accountability, for better or worse. As underscored by Daugirdas and Burci,¹²³ the WHO is in a peculiar situation regarding its budget. Most of the organization's operational finances depend on voluntary contributions by both states and by non-state actors, which range beyond their legal obligations by way of 'assessed' contributions. The prospect of withdrawal of funds plays a major role in swaying the WHO's decision-making – one way or the other.

To be clear, we do not claim there is a causal relationship where the organization inevitably caters to the will of its funders: the WHO has historically

119 For a detailed analytical account, Sudeepa Abeysinghe, *Pandemics, Science and Policy. H1N1 and the World Health Organization* (Palgrave Macmillan: New York, 2015) pp. 133–137.

120 *Statement presented by Dr. Wolfgang Wodarg, medical expert specialising in epidemiology and former Chair of the Sub-committee on Health and the Parliamentary Assembly, Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe* (Strasbourg, 26 January 2010).

121 *Statement by Dr. Keiji Fukuda on Behalf of WHO at the Council of Europe Hearing on Pandemic (H1N1) 2009*, http://www.coe.int/t/DC/Files/PA_session/jan2010.

122 *The Handling of the H1N1 pandemic: more transparency needed*, Resolution 1749 of the Parliamentary Assembly of the Council of Europe (24 June 2010).

123 Kristina Daugirdas and Gian Luca Burci, 'Financing the World Health Organization: What Lessons for Multilateralism?' (2019) 16 *International Organizations Law Review* p. 299.

taken decisions to the chagrin of its major donors.¹²⁴ It did so most recently during the COVID-19 pandemic, against the wishes of the government of the United States under the Trump administration. The consequence was a potential withdrawal of the country's Membership. Yet beyond the fact that the organization may engage in decision-making independently from its major funders, withdrawing of funds by donors is considered, in itself, to be a form of accountability.

Similarly, an increased reluctance by states to contribute to international organizations may severely undermine the fulfilment of their functions. Thus, accountability may be indirectly fostered through national processes of scrutinizing public finances. In democratic systems, budgets are usually the outcome of the decision-making of multiple branches of government; the question of whether financial contributions to IOs are worthwhile may, and often do come to the floor. A reduction of these contributions would not be in conformity with the Constitution of the WHO if they are assessed in nature. In respect of the WHO's budget, a reduction of the voluntary contributions could fall within states' existing leeway in the matter. The memory of the budget freeze of the UN by the United States, a major contributor, starting from the 1980's still casts a long shadow which led to major shifts in the funding schemes, with the WHO being no exception.¹²⁵

During the COVID-19 pandemic, several Senators in the United States Congress called for an investigation into the WHO's handling of the beginning of the event. These calls included the potential to hold hearings in the Senate involving WHO personnel. At stake was the possibility to reduce the United States' contributions, a budgetary matter where the Senate's approval plays a pivotal role. Moreover, there is an ongoing review into the role of WHO as part of the UK Parliament's Foreign Affairs Select Committee inquiry in global health security. Given the organization's functional immunity, the potential findings of these inquiries will not lead to any consequences under international law, however, under a broader conception of accountability, it does represent a showcase of how the organization's main contributors may resort to their own national procedures for that purpose.

¹²⁴ For example, the Primary Health Care strategy advocated by former WHO Director-General Halldan Mahler in the 1970s was met with multiple criticisms, including by medical associations in several Member States. Tine Hanrieder, *International Organization in Time. Fragmentation and Reform* (Oxford University Press: Oxford, 2015) pp. 71–72.

¹²⁵ Gian Luca Burci and Claude-Henri Vignes, *World Health Organization* (Kluwer Law International: The Hague/London/New York, 2004) pp. 203–204.

Considering the asymmetrical financial contributions to the WHO, not all Member States hold the same sway over its activities. This includes calls for national-level inquiries. The major contributors are likelier to be more effective in calling for accountability in the case of PHEICs. A driving factor is the need by national authorities, particularly legislative bodies, to ask for explanations linked to the use of taxpayers' contributions. Yet despite their rarity so far, national-level hearings pose the danger of a slippery-slope. If all Member States disagreeing with the organization's decision-making could initiate a formal inquiry, it could lead to institutional paralysis. Inquiries are ongoing.

5.2.4 Non-state Actors

As mentioned above, non-state actors contributing to the WHO's budget are in a privileged position to hold the organization accountable. The power held by these actors in steering the organization's policies towards their preferred programmes has been a longstanding concern.¹²⁶ Arguably, the influence of non-state actors has led in the past to changes in the WHO's internal governance structure towards a more managerial style.¹²⁷ There was an increase in results-based assessments of each of the WHO's programmes.¹²⁸

The exercise of emergency powers certainly does not escape these dynamics. While the WHO is not legally accountable towards non-state actors, these may nevertheless exercise a broader type of oversight. Donors in the area of public health emergencies may gain leeway in choosing certain approaches over others. Other non-donor institutions are in a privileged position to deploy their expert input in critical assessments of the WHO's actions. The aforementioned report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola was composed by members of multiple stakeholders from academic institutions and civil society organizations. Their critical views contributed to a more comprehensive ex post diagnosis of the main shortcomings.

An overarching problem with accountability stemming from non-state actors is that they generally respond to interests which are private in nature. They do not represent either voters or a country's population, but rather their own donors, shareholders and governing boards.¹²⁹ They might have contrasting views on what should be prioritised, and why. Therefore, when holding the WHO accountable for its actions, it is not clear whether non-state actors base

126 Devi Sridhar and Lawrence Gostin, 'Reforming the World Health Organization' (2011) 305:15 *Journal of the American Medical Association*, pp. E1-E2.

127 Mainly during WHO Director-General Gro Harlem Brundtland. Kelley Lee, *The World Health Organization* (Routledge: Abingdon, 2009) pp. 105–106.

128 *Ibid.*

their assessment on the proper exercise of its legal mandate, or the extent to which the organization has tended to their preferences. Non-state actors working on a non-profit basis, either from academia or from civil society organizations, may exercise a balancing act. Steps should be taken to ensure that appointees to these bodies are selected under transparent and be representative to the largest extent possible.

6 Conclusions

Framing the WHO's emergency powers requires capturing the governance innovations of the IHR 2005. The fact that they do not create obligations for states does not mean they are irrelevant for the handling of PHEICs. To the contrary, it may make a considerable difference in appropriate emergency response. At the same time, a diagnostic of how those powers are exercised in the face of PHEICs is needed for devising potential ways to enhance the organization's accountability. There need to be both internal and external mechanisms for developing yardsticks for warning of the abuse of emergency powers, or the omission in their use when they are needed.

Considering the difficulties inherent in claims on the legal responsibility of international organizations, alternative paths of accountability can be deployed through ex post assessment tools. It does not guarantee a path towards actual reforms, nor to an effective "lessons learned". Nevertheless, factual-political accountability mechanisms, though not leading to legal consequences, have contributed to scrutinise the WHO's exercise of emergency powers in the past. Their impact on the credibility of the organization will continue to determine, to a large extent, whether and how states follow its recommendations in response to pandemics, or whether they go their own way. Beyond their actual legal nature and consequences, emergency powers can play a fundamental role in galvanising coordinated efforts to fight global events such as COVID-19.

Notes on Contributors

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129 Gostin and Sridhar, *supra* note 126.

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